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Contemporary Regulatory Policy

THIRD EDITION

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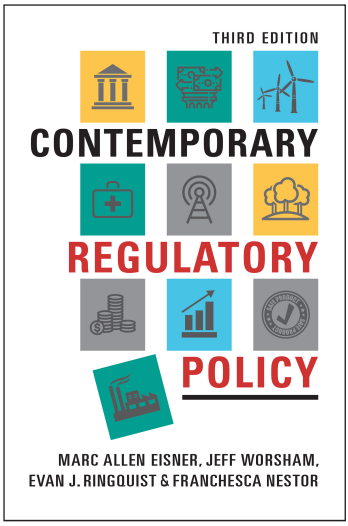

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Preface

In the late 1960s, as the war in Vietnam dominated the headlines of the nation's newspapers, a number of salient events at home forced policymakers to turn their attention to regulation. In 1968, an explosion at a coal mine in Farmington, West Virginia, killed seventy-eight miners. As labor advocates mobilized to expand workplace protections, they could cite the shocking statistic that, on an annual basis, more Americans were dying in the workplace than in Vietnam. In 1969, the Cuyahoga River caught fire and the pristine beaches of Santa Barbara were despoiled by an offshore oil spill. Major cities like Los Angeles and New York were veiled in smog, resulting in high levels of respiratory distress and deaths. These events and others led to the creation of new agencies—most notably the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), and the Consumer Product Safety Commission. In addition, Congress passed new regulatory statutes addressing the workplace, the environment, and consumer product safety, mostly with overwhelming bipartisan coalitions. These statutes provided the legal foundations for an ambitious and costly commitment to using public policy to protect citizens, communities, and ecosystems from the negative by-products of industrial production.

While the 1970s began with the greatest expansion of the regulatory state since the New Deal, it was soon mired in high inflation and unemployment, both of which critics could link to the new "regulatory burden." One response was deregulation, which cut across economic regulations for air and surface transportation, banking, energy, and telecommunications. In some cases, well-established agencies like the Interstate Commerce

Commission and the Civil Aeronautics Board were eliminated. Although the newly created social regulatory agencies proved relatively immune from deregulation in the 1970s, with the election of Ronald Reagan in 1981 they became the targets of a full-frontal assault. Agencies placed under the direction of anti-regulatory appointees were forced to weather sharp budget cuts, which forced deep reductions in staffing. Under Executive Order 12291 (1981), they were required to subject significant new regulations to cost-benefit analysis before they could be promulgated. Yet the critics of regulation failed to recognize the depth of public and congressional support for policy. The frontal assault proved short-lived.

Challenges would continue into the 1990s, particularly following the 1994 midterm elections, when Republican majorities assumed control of both chambers of Congress for the first time since the Eisenhower administration. When the first edition of this book was published in 2000, it appeared that the sharp conflicts of the 1980s had diminished in intensity. The requirement that agencies justify their regulations through an application of cost-benefit analysis may have seemed radical in 1981. But President Clinton's Executive Order 12866 (1993) strengthened the review process, and by 2000 the role of cost-benefit analysis in regulatory review had survived for some two decades under Republican and Democratic administrations. While earlier critics had chastised agencies like the EPA and OSHA for their adversarial posture and reliance on command-and-control regulations, by the 1990s, under the banner of "reinventing government," most regulatory agencies were relying on voluntary programs and partnerships with businesses and trade associations to extend the reach of policy and leverage private-sector resources. Indeed, there appeared to be something of a consensus that regulation was compatible with markets. The public could demand higher levels of corporate accountability without sacrificing profitability and economic dynamism.

Unfortunately, the next decade would reveal that the regulatory state failed to provide sufficient safeguards. When the second edition of this book was published in 2006, the authors had no reason to anticipate the tumult of the next several years. Most notably, the subprime crisis of 2007–2008 plunged the nation into the deepest recession since the Great Depression. The crisis, which emanated in parts of the financial industry that had been loosely regulated, reflected the failure of Congress in the 1980s and 1990s to recalibrate policy to address securitization and shadow banking and the risks they entailed. Critics would note that the insufficiency of regulation so clearly exhibited in finance was replicated in other regulatory arenas, where the promulgation of new regulations and enforcement had lagged. In the midst of the crisis, the nation elected Barack Obama for the first of two terms as president. President Obama, a Democrat, ran for office with a commitment to strengthening regulation and

securing a new statute to combat climate change. During the next two years, Congress passed the American Recovery and Reinvestment Act (2009), the Patient Protection and Affordable Care Act (2010), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (2010). Although these were significant statutes with important regulatory ramifications, they were passed along party lines.

With united Democratic control of Congress and the White House following the 2008 elections, few would have anticipated that the Republican Party—backed by the conservative populism of the Tea Party movement—would reclaim control of the House of Representatives two years later. While the Democratic Party would hold the Senate by a narrow margin, the passage of new regulatory statutes proved impossible. When the Republicans claimed control of the Senate in the 2014 midterm elections, and under conditions of growing partisan polarization in Congress, the stage was set for a stalemate that had significant consequences. Any window of opportunity that might have existed for the passage of climate change legislation slammed shut. Thereafter, congressional resistance to President Obama, combined with sharp reductions in the budgets of key agencies, placed sharp constraints on the administration's regulatory agenda. Under these conditions, President Obama turned to unilateralism, seeking to extend the reach of regulation through executive actions, often daring a gridlocked Congress to respond. While there were some clear victories, there was also a sober recognition that what was achieved through unilateral action could be reversed by the courts or subsequent administrations. Ultimately, the 2016 election of Donald Trump would reveal the fragility of much of what President Obama had aspired to do in the area of regulation, and more broadly.

As the preceding discussion suggests, this new edition of *Contemporary Regulatory Policy* extends the analysis of the previous edition to cover the final years of the George W. Bush administration, the two-term Obama presidency, and the beginning of the Trump administration. These were difficult times. The period witnessed changes in the larger political-institutional system—most notably the growing problems of partisan polarization in Congress and the challenges it poses for the administrative state. During this period, some important technological changes dramatically recast regulation (e.g., the rise of cellular networks and the Internet in telecommunications; the growing importance of hydraulic fracturing and deep and ultra-deep oil exploration in energy policy; the rise of securitization and shadow banking in finance). It also witnessed some tragic regulatory failures, including the financial crisis and the BP Deepwater Horizon spill of 2010, both of which could be understood as a product of the failure of policymakers to update policy in light of the technological changes just noted. Indeed, by the end of the Obama presidency, regulation in many areas rested on dated statutes that often denied administrators the flexibility they

would need to adjust policy to address emerging problems and what had been learned in previous decades about the efficacy of various policy instruments.

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This book provides an overview of contemporary regulatory policies, focusing on some of the central debates and controversies of the past several decades, which are grounded necessarily in some of the larger debates about the administrative state and the dynamics of policy change. Although we share a healthy respect for economic analysis, we are political scientists by training. Thus, the book approaches the subject largely through the lens of policy analysis. Also, we have endeavored to present the material to maximize accessibility so that the book will offer something of substance to a broader informed audience who want to understand how and why we regulate.

Besides accessibility, the book differs from many of the existing volumes on regulation in two important ways. First, we are committed to a simple proposition: institutions matter. The way in which public authority is organized has a profound impact on political accountability, opportunities for participation, and the ultimate success of public policy. Public policy is a pattern of goal-driven actions. Thus, the way in which policy is implemented by regulatory agencies must be of central concern to students of regulation. Although much scholarship on regulation relies on simplifying assumptions that extract organizations from the picture—essentially transforming regulatory studies into exercises in applied microeconomics—we hope to convey a more historically and theoretically rich account.

Second, regulation is often an ideologically charged subject. Many works on regulation have been grounded in an explicit or implicit assumption that markets are, in and of themselves, sufficient, and that public policy, as a result, has little if any positive role to play. We do not aspire to stake out an ideological argument for or against regulation, but rather to explore the factors that have shaped regulatory policy design and implementation. Although we are critics of bad policy and administration—a point that will become evident in each chapter of this book—we are not critics of regulation per se. We believe there are valid reasons to regulate, and these justifications cannot be reduced to discussions of market failure. It is up to the readers to arrive at their own conclusions regarding the ultimate justification for regulatory policy.

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Scholarship is a collective endeavor, and we must acknowledge the role of our colleagues, former mentors, students, friends, and readers of earlier editions in contributing to our ongoing collaboration. We will not identify

here all those who have deepened our understanding of regulation; the bibliography provides some sense of our intellectual debts. As in past editions, we would like to thank explicitly a growing list of those who have made the study of regulation so much fun: Thorne Auchter, Christopher Cox, Paul Rand Dixon, Anne Gorsuch-Burford, Alan Greenspan, Rita Lavelle, Manuel Lujan, Ken "Famous" Meier, James C. Miller III, Gale A. Norton, Daniel Oliver, Scott Pruitt, Terrance Scanlon, M. Danny Wall, and James Watt.

This volume is a team effort, and we note with sadness that our team has lost a central member. Evan J. Ringquist—a great social scientist and even better friend—died in 2014, following a lengthy battle with cancer. Even if he did not live to see the publication of this edition, he nonetheless contributed to many of its chapters (most notably the chapters on environmental protection and energy), the original conceptualization of the project, and our own growth as scholars. While Evan is no longer with us, we welcome a new coauthor, Franchesca Nestor. Her imprint on this volume is most clearly seen in the new chapter on food safety regulation (Chapter 9). Although we have dedicated this book to Evan, each of the authors have their own dedications. Marc would like to thank Patricia, as always, for her love, friendship, and wise counsel. Jeff would like everyone to know what Deb already knows, that he is simply the instrument of her will. Franchesca thanks her nieces and nephews, Daisy, Lucy, Wes, Levi, and A. J., who remind her why regulation is so important.